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In the

Supreme Court of the United States
October Term, 1994

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, individually and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Should this court's holdings in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois, be expanded to public employees to recover damages from their employer without demonstrating either that their employer considered or was even aware of their political affiliations or activities or that those individuals whose appointment assertedly necessitated their termination had engaged in and were being hired because of their political activities and affiliations?

2. Are public officials entitled to qualified immunity under this Court's decision in Harlow v. Fitzgerald where, by virtue of a novel and unprecedented extension of this Court's holdings in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois, their actions in discharging two public employees are deemed to be violative of the First Amendment even though the public officials did not consider and were not even aware of the political affiliations of the employees?

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v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners Respectfully Request That A Writ Of Certiorari Issue To Review The Judgment Order Of The United States Court of Appeals for the Third Circuit Entered In This Proceeding On March 29, 1995

OPINIONS BELOW

The unreported Judgment Order of the United States Court of Appeals for the Third Circuit, entered on March 29, 1995, is appended hereto as Appendix A. The unreported opinions and orders of the United States District Court entered on November 4, 1993 and June 6, 1994 appear, respectively, as Appendix B and Appendix C.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was filed on March 29, 1995. The jurisdiction of this Court is therefore invoked under 28 U.S.C.A. §1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

This matter involves the First Amendment of the United States Constitution which provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This matter also involves 42 U.S.C.A. 1983.

STATEMENT OF THE CASE

This petition presents the question of whether two former employees of the State of New Jersey may recover damages for the termination of their employment under the principles enunciated by this Court in Elrod, Branti, and Rutan without making any demonstration that the termination of their employment was a result of their political affiliations or activities.

The plaintiffs initiated this action by filing a complaint in the district court for the District of New Jersey against four State officials pursuant to 42 U.S.C.A. §1983, 1985(3) and 1986. The plaintiffs' complaint alleged that the defendant State officials had terminated the plaintiffs' employment with the State of New Jersey because of the

plaintiffs' "political affiliation and associations." The defendants denied that the termination of the plaintiffs' employment had anything to do with their "political affiliation and associations." Moreover, the defendants asserted that they had acted in good faith and were accordingly entitled to qualified immunity.

Following discovery, the plaintiffs elected to dismiss certain of the claims asserted in their complaint. Additionally, the plaintiffs also elected to alter the basic contentions underlying their remaining claims against the defendants. Rather than continuing to assert that their employment had been terminated because of their "political affiliation and associations," they chose instead to contend that the termination of their State employment had been a result of their lack of political affiliation.

A. The testimony at trial

James Florio was inaugurated as Governor of the State of New Jersey in January, 1991. At that time, the State Government was experiencing increasing financial difficulty. As a consequence, the various departments and agencies of the State Government were making efforts to limit expenditures, including those related to employee salaries and wages.

Following his inauguration, Governor Florio appointed Melvin R. Primas as Commissioner of the New Jersey Department of Community Affairs. Primas had previously served as a Mayor of the City of Camden and was a member of the Democratic Party. Primas, in turn, designated Barry Skokowski, an individual who had worked in the Department since 1971, to serve as the Department's Deputy Commissioner. Skokowski was a Republican.

Following their appointments, Primas and Skokowski were responsible for determining how, in light of the State's

financial difficulties, Department expenditures could be curtailed. At the same time, they were also responsible for hiring individuals to work in the Department's various divisions and agencies who would conscientiously carry out the policies established by the Governor and the Department. In determining what steps to take in this regard, Primas and Skokowski examined middle management positions in the Department. A number of the individuals in such positions were in the unclassified civil service status and could accordingly be terminated at will without compliance with the civil service procedures applicable to the termination of employees with classified status. Moreover, termination of such employees would generate greater savings than would the termination of lower level and lower paid employees. Additionally, termination of middle management employees who did not provide services directly to the public would lessen the impact of personnel reductions on the provision of such services.

Among the agencies with which they were concerned was the Office of the Ombudsman for the Institutionalized Elderly. The Office had been established to promote, advocate and ensure the adequacy of the care received by elderly individuals in both public and private institutions. The Ombudsman in charge of the Office is appointed by and serves at the pleasure of the Governor. While he is authorized to appoint employees to work in the Office, he must do so within the limits of funds appropriated or otherwise made available for that purpose. The annual appropriations made by the State Legislature for the Ombudsman are included within that part of the State's annual appropriations acts pertaining to the Department of Community Affairs. The Department is accordingly responsible for handling various fiscal matters for the Ombudsman's Office including processing the hiring and termination of employees and the payment of their salaries and benefits.

Among the functions of the Ombudsman's Office is the investigation of complaints of abuse of elderly people in institutions. The Office employs a number of investigators for this purpose. The plaintiffs had initially hired been as investigators to perform this function. However, they were eventually appointed to supervisory positions within the Office after which neither individual was responsible for personally conducting such investigations. Furthermore, both individuals were unclassified employees and could accordingly be terminated at will.

At the time of Governor Florio's inauguration, William R. Abrams was serving as Ombudsman. Following the inauguration, certain changes occurred within the Ombudsman's office. Both the Office's chief legal counsel and its assistant supervisor in charge of nursing investigators resigned. Moreover, given the continuing need to reduce expenditures both within the Ombudsman's office and within the other divisions and agencies of the Department and the concurrent obligation to appoint individuals to positions within the Department who would carry out the policies of the new administration, Skokowski discussed further staff reductions with Abrams. Given the administration's policy that personnel reductions be focused at the middle management level, Skokowski suggested that Casale and Edmunds be terminated. Abrams rejected Skokowski's and Primas' requests in this regard.

At no time during these meetings did any discussion occur regarding the political affiliations or activities of the plaintiffs. Moreover, the record indicates that neither Skokowski nor Primas knew, or had any reason or basis for knowing what political affiliations, if any, the plaintiffs may have had or what political activities, if any, they may have engaged in.

As a result of his refusal to discharge the plaintiffs and to otherwise cooperate with the administration's efforts to

reduce the level of expenditures, a decision was made to replace Abrams as Ombudsman. However, it was also agreed that he would continue to oversee the activities of the Office until such time as his successor was appointed. Nevertheless, in light of Abrams' holdover status and his unwillingness to cooperate in reducing expenditures at the Ombudsman's Office, Skokowski concluded that it would be necessary to assign another individual to monitor the Office's operations until a new appointment was made.

Skokowski selected Elaine Mahoney to perform this function. Mahoney had previously worked in various positions both in other public agencies and in private business and most recently had been employed with the New Jersey Builders Association where she worked in public relations and performed some lobbying. No evidence was presented, however, that Mahoney had ever been affiliated with or had engaged in political campaigning or activities on behalf of a particular political party or candidate.

Two other individuals, Tom Brown and William Macchi, were also hired to work at the Ombudsman's Office during this period of time. Both had had extensive experience in working with elderly institutionalized individuals. Brown had worked with such individuals in various capacities for a number of years in Maryland. Macchi had served as director of a county office on aging in New Jersey. While the evidence presented at trial indicated that Brown had known Primas, on a personal basis, for a long period of time, no evidence was presented to indicate that Brown had ever worked, had ever been active, or had ever been affiliated in any manner with any political organization or that he had been hired on the basis of any affiliations with or any activities undertaken on behalf of any political party or candidate. Similarly, while Macchi had served in an appointed public office for some period of time prior to his employment with the Ombudsman's Office, there was also no evidence presented

regarding any political activities or affiliations on his part prior to his employment with that Office.

In September, 1990, Harold George was appointed to replace Abrams. George had previously served as a Deputy Attorney General of the State of New Jersey. No evidence was presented that George had ever been affiliated with any political party or had ever been engaged in political activity in any way.

Following his appointment, George made an evaluation of the Office to determine what changes he might wish to make. In doing so, George was mindful of the budget constraints within which he was required to operate. On the basis of this review, George decided that a legal counsel needed to be hired and also that a significantly greater emphasis should be placed upon disseminating information regarding the Office and its activities to those facilities and individuals for whom the Office was responsible. On the basis of these considerations and circumstances, George concluded that it would be necessary to terminate the plaintiffs' employment in order to make funds available to hire a legal counsel and a public relations officer. As a consequence, George forwarded letters to the plaintiffs to advise them that their employment with the Ombudsman's Office would be terminated.

In making this decision, George was unaware of whether Casale or Edmunds were or were not members of any political party or of whether either of these individuals had ever engaged in political activities. Nor is there any evidence that George was aware of whether any other employees in the Office had any political affiliations or had engaged in any political activities.

Following the termination of the plaintiffs, various measures were implemented to reorganize the Office. At the time that Brown was hired, Casale had been on extended

sick leave. In his absence, Brown assumed his responsibilities of supervising the investigators in the Office. Given this circumstance, George concluded that Brown would assume the responsibilty of supervising all of the Office's investigators. During Abrams' tenure as Ombudsman, he had employed three separate individuals, a supervisor and two assistant supervisors, for this purpose. Moreover, Brown also assumed the responsibility for maintaining a caseload which required that he conduct investigations of complaints himself. During their employment, neither Casale nor Edmunds had maintained such a caseload.

George also hired Goldie Colonna, Esq., to serve as legal counsel and appointed Elyse Rosser to head the public affairs unit he had established through to better disseminate information regarding the activities of the Office to individuals and facilities for which the Office was responsible. No evidence was presented regarding what, if any, political affiliations Colonna or Rosser may have possessed or what, if any, political activities they may have previously engaged in.

The record in this matter is barren of any evidence which would indicate that either of the plaintiffs were terminated from their employment because of their political affiliations and associations. In fact, there0 was no evidence as to what, if any, political affiliations they may have had. Nor was there any evidence presented regarding the political affiliations and activities of those individuals, i.e. Brown, Macchi, Mahoney, Colonna and Rosser, who were hired to work at the Ombudman's Office during this same time period. Rather, the evidence presented at trial indicated that none of the defendants knew or were in any way aware of whetherthe plaintiffs were or had ever been affiliated with or active in any political organizations.

B. The rulings below

At the conclusion of the plaintiffs' case, defendants moved for entry of judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). The district court elected to reserve decision with regard to this motion. The defendants then rested and once again moved for entry of a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). Again, the district court reserved decision and proceeded to submit the case to the jury. In doing so, the district court rejected the objection of the defendants to the inclusion of an instruction in the jury charge that the jury could find for the plaintiffs if it found that they had been terminated to permit the hiring of "politically connected" individuals.

Following deliberation, the jury returned verdicts awarding the plaintiffs both compensatory and punitive damages. Thereafter, on November 4, 1993, the district court issued an Opinion and Order denying defendants' motion for judgment as a matter of law pursuant to Fed.R. Civ.P. 50(a). In issuing its opinion, the district court held that the plaintiffs' claims "that they were dismissed because they were insufficiently active in politics, and in order to make room for politically-connected individuals" fell within the protection of the First Amendment.

A Judgment was subsequently entered on December 15, 1993 reflecting the verdict rendered by the jury. At that time, defendants renewed their request for the entry of a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) and also made application for a new trial pursuant to Fed.R.Civ.P. 59.

On June 6, 1994, the trial court issued on Opinion and Order denying the defendants' motions in this regard. Thereafter, on July 1, 1994, the defendants filed a Notice of Appeal with the Court of Appeals for the Third Circuit pursuant to 28 U.S.C.A. §1291 seeking review of the trial

court's orders of November 4, 1993 and June 6, 1994 as well as the Judgment entered in this matter on December 15, 1993. On March 29, 1995, the Third Circuit Court of Appeals issued a Judgment Order affirming the Judgment of the District Court for the reasons set forth in the district court opinion dated November 4, 1993

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE JUDGMENT ORDER OF THE CIRCUIT COURT BECAUSE THE DECISIONS OF THE CIRCUIT COURT AND THE DISTRICT COURT BELOW CONSTITUTE A TOTALLY UNPRECEDENTED AND UNWARRANTED EXTENSION OF THE PROTECTIONS WHICH THIS COURT'S DECISIONS IN ELROD V. BURNS, BRANTI V. FINKEL AND RUTAN V. REPUBLICAN PARTY OF ILLINOIS AFFORD TO PUBLIC EMPLOYEES FROM DISCHARGE OR OTHER ADVERSE EMPLOYMENT ACTION ON THE BASIS OF THEIR POLITICAL AFFILIATIONS AND ACTIVITIES

Under the First Amendment of the United States Constitution, public employees are, with certain exceptions, protected from discharge or other adverse employment action as a result of their political affiliations or activities. However, as is made clear in this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel 445 U.S. 347 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the protections afforded by the First Amendment in this regard are intended to protect such employees from employment actions taken by their employers on the basis of partisan political considerations and which would, as a consequence, serve to coerce such employees to adopt, or to disassociate themselves from, a particular political belief.

The decisions of the Court of Appeals and the district court below represent a radical departure from the principles enunciated in Elrod, Branti and Rutan and constitute an unprecedented and unwarranted expansion of this Court's prior holdings in those cases. They purport to extend the protection of the First Amendment to employment actions affecting public employees without regard to whether such actions are based on or have any relationship to the employees' particular political activities or beliefs.

In plain language, the plaintiffs' First Amendment claims in this matter have absolutely nothing to do with their political beliefs. Rather, the plaintiffs claim that the First Amendment is intended to protect public employees from being fired or demoted solely because they do not have the right "connections" or "know the right people". This Court has never held that the principles enunciated in Elrod, Branti and Rutan were intended to extend to such circumstances or be given such scope.. Further, the implications which such an extension of these principles would pose for public employers are enormous. Accordingly, this Court's intervention in this matter, through the issuance of a writ of certiorari to the Court of Appeals, is required.

This Court's decisions in Elrod, Branti and Rutan have established the principle that a public employee's continued employment may not be conditioned upon the pledging of that employee's alliance to a particular political party, on working for a particular political party or on making financial contributions to a political party. These decisions have accordingly made clear that public employees may not be discharged as a result of the practice of "patronage", e.g. the practice under which public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.

In seeking to avail themselves of the protections afforded under Elrod, Branti, and Rutan, public employees must, of course, demonstrate that any discharge or other adverse employment action to which they have been subjected has from their choice to engage or not engage in activities protected by the First Amendment, i.e. to affiliate or not affiliate with or to renderor to not render support to a particular political party or candidate. In turn, in order to meet this standard, public employees must show that their continued employment was conditioned on a pledge of political alliance to a particular political party or candidate, on the provision of financial support to such a party or candidate, on the provision of work for a political party or candidate, or on the need to obtain sponsorship from a particular party or candidate. Elrod v. Burns, 427 U.S. at 355.

The factual predicates of this Court's decisions in Elrod, Branti and Rutan reflect the public employee's obligation in this regard. In Elrod, the plaintiffs established a longstanding practice on the part of their public employer of replacing non-civil service employees with members of his own party and demonstrated that, in order to maintain their jobs, "they were required to pledge their political allegiance" to a specific political party. Elrod v. Burns, 427 U.S. at 350-351. Similarly, in Branti, the plaintiffs, assistant prosecutors whose employment was terminated following the election of a new prosecutor, established that all but one of the assistant prosecutors retained by the prosecutor were members of the prosecutor's political party and had all been selected and sponsored by legislators or political chairmen of that party on a basis that had been determined at a political party caucus. Branti v. Finkel, 445 U.S. at 509-510. Likewise, in Rutan, the plaintiffs established that all employment decisions made following the election of the Governor named as a defendant in that case were required to be reviewed by the Governor's office which, by determining whether existing and prospective employees had

provided financial support to or voted in the primaries of the Governor's political party, used that system to operate a political patronage system "to limit State employment and beneficial employment-related decisions to those who are supported" by the Governor's party. Rutan v. Republican Party of Illinois, 497 U.S. at 66.

Accordingly, it is the obligation of plaintiffs who assert claims under Elrod, Branti, and Rutan to demonstrate that their employment has been terminated because of their political affiliation or lack thereof. Laskaris v. Thornburg, 733 F. 2d 260 (3d Cir.1984) cert. denied 469 U.S. 886 (1984). Moreover, implicit in their obligation to make such a demonstration is the essential obligation to demonstrate that their public employers knew either of their participation in activities protected by the First Amendment or of their choice not to engage in such activities. Laskaris v. Thornburgh, 733 F. 2d at 265.

The decisions of the Court of Appeals and the district court below represent a radical departure from the principles which this Court has enunciated in Elrod, Branti and Rutan. The plaintiffs in this matter were permitted to recover substantial damages against the State official defendants without having been required to establish any legally sufficient evidentiary basis in support of their claims that they were terminated on the basis of their political affiliations. In fact, the evidence presented at the trial supports only one reasonable conclusion: the termination of the plaintiffs Joseph Casale and William Edmunds from their employment with the State of New Jersey had absolutely nothing to do with whatever decisions they may have made to engage or not engage in activities protected by the First Amendment of the United States Constitution. Yet, notwithstanding the plaintiffs' failure to produce evidence to support of their claims that they lost their jobs because of their political affiliation, the district court permitted the jury to conclude, on the basis that certain individuals were

"politically connected", the defendants were liable for damages for having violated the plaintiffs' First Amendment rights.

Moreover, in denying the defendants' motion for judgment as a matter of law, the district court did not even address the burden of proof imposed on public employees in cases such as this. Rather, the district court merely noted that public employees have a cognizable claim under the First Amendment where they are discharged "to make room for politically connected individuals" and then proceeded to hold that evidence of the requisite knowledge and intent of the defendants need not be established by direct evidence. The district court then concluded that the defendants' motion should be denied without noting one specific piece of evidence presented by the plaintiffs to meet their burden under the foregoing cases.

While the First Amendment protections articulated in Elrod, Branti and Rutan may extend to public employees who choose not to engage in political activity, see Bennis v. Gable, 823 F. 2d 723, 731 (3d Cir. 1987), the standards for determining whether the First Amendment rights of such employees have been violated must be the same as for public employees who choose to actively engage in such activity. More particularly, in seeking to invoke the principles articulated in Elrod, Branti and Rutan, a plaintiff bears the burden of proving: (1) that he is a public employee; (2) that he chose to engage or not engage in a protected activity, such as maintaining or not maintaining an affiliation with a particular political party; and (3) that his choice to associate or not to associate was a substantial or motivating factor in the state actors' personnel decision. Moreover, implicit in this obligation is that the plaintiff demonstrate that defendants at least knew of the plaintiffs' decision to participate or not to participate in such political activity. Otherwise, the public employee's political

affiliations would have had nothing to do with his termination.

A review of the record below indicates that plaintiffs absolutely failed to make any such demonstration here. First, the evidence presented indicated that none of the defendants were aware either of the political affiliations or activities of the plaintiffs or of any determinations made by the plaintiffs not to engage in such activities. Moreover, the plaintiffs acknowledged in their own testimony that none of the defendants knew, or would have had reason to know, of their political affiliations or activities, or of their decision not to affiliate with or support any political organization or candidate, prior to the decision to terminate their employment.

In lieu of making such a demonstration, plaintiffs asserted instead that they were terminated in order to permit the hiring of other individuals with the "proper" political affiliations. However, plaintiffs failed to present any evidence whatsoever as to what, if any, political affiliations these individuals may have had or as to what, if any, political activities these individuals may have undertaken in providing support to any political candidate or organization.

In sum, there was simply no evidence to support a conclusion that the decision to terminate the plaintiffs' employment had anything to do either with their decision not to affiliate with or support any political party or organization or with the political affiliations or activities of the individuals whose employment allegedly caused the plaintiffs' termination. The decisions in Elrod, Branti and Rutan do not stand for the proposition, as asserted by plaintiffs, that public employees cannot be discharged merely because they do not "know" the right people. Rather, in order to fall within the protection afforded by these decisions, a public employee must demonstrate that he or she was terminated because of a conscious determination

made by his or her employer that relates to that employee's engaging or failing to engage in political activities protected by the First Amendment.

Moreover, not only are the the rulings of the Court of Appeals and the district court a significant departure from this Court's decisions in Elrod, Branti and Rutan, they are also in conflict with the reported decisions of other Courts of Appeals and, in fact, with the prior decisions of the Third Circuit in this area. In its prior decision in Laskaris v. Thornburgh, supra, 733 F. 2d at 265, the Third Circuit had made clear that public employees alleging unlawful discharge on the basis of political affiliation (or lack thereof) have the obligation of demonstrating that the discharges were the result of a conscious decision by their public employers to terminate their employment either because of the employee's political affiliations or because of a desire to provide employment to other individuals who have been shown to have been political supporters of the political party in power.

In Laskaris, the plaintiffs presented evidence that they were members of the Democratic party at the time they were discharged and that at least one of the individuals hired to replace them was a Republican. Id. at 265. They also presented evidence that one of the defendants had indicated that he expected the newly elected Governor to "clean house" and had further recommended the termination of "incompetent political hacks." Id. at 265. In reviewing the record before it, the Third Circuit found that the plaintiffs had failed to produce any evidence indicating that the defendants had any knowledge of the plaintiffs' political affiliations. Id. at 265. While observing that the evidence presented by the plaintiffs might be viewed as having a "vague aura of politically motivated patronage firings," the Third Circuit found that such evidence was "far too insubstantial" to show that plaintiffs were discharged because of their political affiliations. Id. at 266. Rather, the

Third Circuit held that the plaintiffs must "produce evidence sufficient to show that the defendants knew of their political persuasions" and accordingly ruled that, without demonstrating that the defendants possessed such knowledge, the plaintiffs could not show that their discharge was politically motivated. Id. at 265.[1]

The Second Court of Appeals has also articulated a similar standard. In fact, the Second Circuit Court of Appeals cited the standards set forth in Laskaris in rendering its opinion in Savage v. Gorski, 850 F.2d 64 (2d Cir. 1988),wherein the Court held that the plaintiffs' failure to produce evidence that the defendants in that case were aware of the plaintiffs' political affiliations would bar the plaintiffs' claim of termination on the basis of political affiliation. The evidence in that case indicated that the defendant, a newly elected County Executive, had directed that a list be prepared of all positions in the county without civil service protection although the list did not indicate the name, political affiliation or political activity of any individual employee. Id. at 65. The plaintiffs further presented evidence indicating that they were active in politics and that the defendant County Executive knew of the political activities of at least one of the plaintiffs. Id. at 66. However, nothing in the record indicated that the defendant County Executive had sought to determine the political affiliations of any employee on the list. Id. at 65.

In reviewing the district court's entry of a preliminary injunction against the discharge of the plaintiffs, the Second Circuit noted that the plaintiffs had failed to offer any evidence that the defendant was aware of the political

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[1] See also Bennis v. Gamble, 823 F. 2d 723 (3d Cir. 1987) (holding that the First Amendment protections enunciated in Elrod would protect public employees from being demoted where the employees could prove that their demotion was a result of their failure to provide political support to a newly elected mayor or that they had been demoted to permit the appointment of the mayor's partisan political supporters.)

activities or affiliations of two of the plaintiffs. Id. at 68. Citing Laskaris, the Second Circuit concluded that the plaintiffs' failure to produce such proofs would bar their claim for recovery under the First Amendment. Id. at 68. The court further noted that evidence of the plaintiffs' competence in the performance of their job duties and of the fact that the defendant was a Democrat who had succeeded a Republican administration would be insufficient to support a finding that the plaintiffs' discharges were politically motivated. Id. at 68. Accordingly, in considering the nature of the proofs which a plaintiff must offer in order to prevail on a claim of improper termination because of political affiliation, the Second Circuit followed the Third Circuit's prior holding in Laskaris that such a plaintiff must demonstrate that the defendants had knowledge of the plaintiff's political affiliations.

Similarly, in Correa v. Fischer, 982 F.2d 931 (5th Cir. 1993), the Fifth Circuit also considered the nature of the proofs which a plaintiff must adduce in supporting a claim of improper discharge on the basis of political affiliation. In that case, four employees of a county attorney's office were terminated by the newly elected County Attorney. Id. at 931-932. The discharged employees filed a §1983 action alleging that their dismissals violated their First Amendment rights. Id. at 932. The Fifth Circuit held that, in order to prevail upon such a claim, the plaintiffs had an obligation to demonstrate that their termination "must be motivated by political concerns." Id. at 933. The newly elected County Attorney had advised the plaintiffs that they were being discharged because of lack of funding, because of an incompatibility between the County Attorney and the employees, and because the County Attorney wanted a staff that would be "loyal" to him. Id. at 933-934. The Fifth Circuit concluded that such a letter did not support the plaintiff's claims that they were terminated because of their political activities or affiliations. Id. at 934. In reaching this conclusion, the Fifth Circuit noted that the plaintiffs had

provided no evidence that the individuals hired to replace the plaintiffs were people who had helped the County Attorney in his campaign or were otherwise "politically favored" by the County Attorney. Id. at 934. Further, the Fifth Circuit noted that there were no evidence or allegations that the County Attorney even knew of the plaintiffs' political affiliations or beliefs. Id. at 935.

Likewise, the Seventh Circuit has, on two separate occasions, rejected claims by plaintiffs that they were terminated in violation of their First Amendment rights because such plaintiffs had failed to adduce sufficient evidence to demonstrate that their terminations were politically motivated. In Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980), the plaintiff presented evidence that he was a Democrat, that the defendants were Republicans, that there had been numerous conflicts between himself and the defendants, and that, for at least two years prior to his termination, two of the defendants had made clear that they wished to have him removed from office. Id. at 1215. The Seventh Circuit held that, even were it to draw all reasonable inferences from the evidence viewed in a light most favorable to the plaintiff, there was insufficient evidence from which a jury could find that the defendants' actions were motivated by political considerations. Id. at 1215. Similarly, in McMillian v. Svetanoff, 878 F.2d 186 (7th Cir. 1987), the Seventh Circuit, in considering a claim by a discharged employee that her termination was a result of her political affiliations, concluded that, even were the plaintiff to have successfully demonstrated that the judge who had terminated her employment was affiliated with the opposite political party, that fact would be insufficient to show that her political affiliation was a motivating factor in her dismissal. Id. at 191.

Additionally, the Ninth Circuit has also addressed the nature of the evidence which a plaintiff must present in seeking to recover on a claim of improper termination on

First Amendment grounds. In Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992), cert. denied 113 S.Ct. 815 (1992), the plaintiff claimed that she was discharged because of her political support of her former supervisor who was defeated during an election by one of the defendants. Id. at 802. Following his election, this defendant forwarded a letter to the plaintiff setting forth a number of reasons related to her job performance in support of his decision to terminate her employment. Id. at 803-804. The plaintiff claimed, however, that she was discharged solely because of her support for the defendant's political opponent. Id. at 804.

While the Ninth Circuit concluded that plaintiff had established that she had engaged in constitutionally protected activity, i.e. the provision of political support for her former employer, the court also found that the plaintiff had not established that this was a motivating factor in her termination. Id. at 804. Upon reviewing the evidence presented by the plaintiff, the Ninth Circuit concluded that, although the plaintiff had presented evidence to demonstrate that she had been a supporter of a political candidate and that she had subsequently been terminated by that candidate's opponent, she had not demonstrated that she had been terminated because she was a supporter of that candidate. Id. at 805. In other words, the court held that a plaintiff in a First Amendment case has the burden of showing not merely that he or she has engaged in constitutionally protected activity and that he or she was subsequently terminated but also that the defendant or defendants knew of the plaintiff's political activities and that their decision to terminate the plaintiff was based on such activities. In turn, where a plaintiff fails to produce proof that the defendants knew of the plaintiff's political activities or affiliation and decides to terminate the plaintiff on the basis of such activities or affiliation, the plaintiff has not satisfied his or her burden of proof and the defendants are accordingly entitled to judgment as a matter of law.

The decisions of the Second Circuit in Savage, the Ninth Circuit in Erickson, and the Fifth Circuit in Correa, as well as the two aforementioned decisions of the Seventh Circuit in Endicott and McMillian, all clearly indicate that, in order for a plaintiff to prevail on a claim of improper discharge under the First Amendment, it is not enough for that plaintiff to show that he or she was politically affiliated or politically active (or politically unaffiliated and politically inactive) and that he or she was subsequently terminated by his or her public employer. Rather, to prevail upon such a claim, such a plaintiff also must demonstrate that the defendants were aware of the plaintiff's political activities or affiliation, or lack thereof, and further that the defendants' knowledge of such circumstances was a substantial or motivating factor in the defendants' decision to terminate the plaintiff. In other words, a public employee must clearly demonstrate a nexus between the employee's political affiliations or activities and the employer's decision to terminate the employee. In the absence of such a showing, a public employee cannot prevail on such a claim.

In permitting the plaintiffs in this matter to recover damages against the defendants without making such a showing, the decisions of the Court of Appeals and the district court in this matter are clearly in conflict with the decisions in these other Circuits as well as with the Third Circuit's own prior decision in Laskaris. The basis of the plaintiffs' claim in this matter was that they were discharged in order to permit the hiring of certain "politically connected" (as opposed to politically affiliated) individuals. Their evidence of such "political connections" was that two of these individuals had previously been employed in governmental positions and that a third had known one of the defendants for a period of fifteen years. The mere circumstance that two of the individuals in question had previously worked for public employers (as hundreds of thousands of other individuals have) and that a third

individual had known one of the defendants for a long period of time, when considered in light of the decisions noted above, clearly cannot support a claim that these other individuals were hired because of their political affiliations or political activities and, in turn, that the plaintiffs were terminated because of their failure to maintain certain political affiliations or engage in political activities.

In light of the foregoing, it is clear that the holdings of the Third Circuit Court of Appeals and the Federal District Court below constitute a significant departure from this Court's decisions in Elrod, Branti and Rutan, that they are in conflict with the decisions of other Circuit Courts of Appeal and that they are inconsistent with the prior decisions of the Third Circuit itself. Moreover, it is also clear that the termination of the plaintiffs in this matter did not in any way implicate a violation of their First Amendment rights. Accordingly, this Court should grant the petition for certiorari.

SINCE THE HOLDINGS OF THE DISTRICT COURT AND THE COURT OF APPEALS REGARDING THE PROTECTIONS AFFORDED TO PUBLIC EMPLOYEES UNDER ELROD, BRANTI, AND RUTAN CONSTITUTED A TOTALLY UNPRECEDENTED AND UNWARRANTED EXTENSION OF THE PRINCIPLES ENUNCIATED IN THOSE CASES AND ACCORDINGLY COULD NOT HAVE REASONABLY BEEN ANTICIPATED BY THE DEFENDANTS, THE DEFENDANTS ARE ENTITLED TO THE PROTECTIONS AFFORDED TO PUBLIC OFFICIALS UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established the standard for determining whether public officials may avail themselves of the doctrine of qualified immunity. The Court held that:

> government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Id. at 818; Emphasis supplied].

In other words, in order for conduct to be deemed violative of clearly established law, the unlawfulness of the conduct must be apparent in light of pre-existing law. Anderson v. Creighton, 483 U.S. 635, 640 (1986).

As has been made clear in Point I, the rulings of the Court of Appeals and the district court below represent an unwarranted and unprecedented extension of the protections provided to public employees under Elrod, Branti and Rutan and reflect a view of the scope of these protections which goes far beyond what this Court had ever contemplated. Unlike the prior decisions which have been rendered by this Court and by the Circuit Courts of Appeals, the decisions below would not require public employees to demonstrate that they had been discharged or demoted because of their political beliefs. Rather, under the lower courts' rulings, such employees could invoke the First Amendment against employment actions on the basis that they did not have the right "connections" or "know the right people."

As no court has ever articulated such an exceedingly broad (and unwarranted) view of the First Amendment, the decisions of the lower courts did not in any way involve the application of "clearly established constitutional rights" and could not have been reasonably anticipated by the defendants. In turn, defendants were clearly entitled to the

protection which the doctrine of qualified immunity is intended to provide to public officials under such circumstances and the failure of the lower courts to apply the doctrine in this case warrants review by this Court.

In the present matter, plaintiffs initially asserted that they had been discharged because of their political affiliations. However, there was no evidence in the record whatsoever to support a conclusion that defendants acted to terminate plaintiffs' employment on the basis of the plaintiffs' political affiliations. To the contrary, the record clearly indicated that none of the defendants even knew what the political affiliations, if any, the plaintiffs had. As a consequence, the plaintiffs changed their contentions to assert instead that they had been terminated to permit the hiring of other individuals, who supposedly were "politically connected" and consequently "knew" someone.

As has been discussed in Point I above, a public employee is required, in seeking recovery under Elrod, Branti and Rutan, to establish both that the public employer acted upon the basis of his or her knowledge of the public employee's political affiliations or lack thereof and that knowledge of such political affiliations (or lack thereof) was a substantial and motivating factor in the employee's termination. This Court's holdings in Elrod, Branti, and Rutan are intended to protect public employees from being discharged as a result of the public employees' political beliefs or affiliation. They do not protect such employees from discharge for other reasons, e.g. budgetary constraints, the public employer's prior professional or personal relationship with such individuals, the other individuals' prior work experience in the public or private sectors, etc. Accordingly, where a public employee asserts that his termination is a result of a desire on his employer's part to reward some other individual for engaging in activities on behalf of, or for affiliating with, a political party which the terminated public employee has not supported or affiliated

with, the employee must demonstrate that the employer knew of the other individual's affiliations or activities in this regard and intended to reward that individual for such support.

The evidence presented during the trial below made clear that: (1) both plaintiffs and defendants acknowledged that the defendants did not know, and would not have had any basis for knowing, the plaintiffs' political affiliations or support; (2) there was no testimony that those subsequently hired after plaintiffs' termination were hired due to their political affiliations or activities; and (3) plaintiffs failed to call any of the after-hired employees or other personnel who might have been able to establish that the after-hired employees were hired on the basis of their political affiliations or activities. Accordingly, the record below was completely lacking of evidence to prove defendants' knowledge of plaintiffs' political affiliations or lack thereof and also did not contain any evidence that such activities or the lack of such activities played any part whatsoever in their termination or that the after-hired personnel were hired on the basis of their political affiliations.

In denying the defendants' motion for judgment on the basis of qualified immunity, the district court noted that a public employee may not be discharged because of his or her lack of political affiliation or to provide a employment position for a supporter of a political party or candidate. However, the district court also completely disregarded the fact that the record before it failed in any way to demonstrate that the plaintiffs had, in fact, been discharged because of their political affiliations or lack thereof and also the fact that the plaintiffs had made no demonstration that any one who allegedly been hired to replace them was hired on the basis of political support he or she had provided to any political party or candidate.

Apparently, the district court concluded that it was enough for the plaintiffs to show that someone hired at the same time they were discharged had known one of the defendants for a period of time or had been employed in some capacity in a public agency (like the plaintiffs themselves had). As a consequence, under the rulings which are the subject of this petition for certiorari, it is apparently no longer necessary to establish that the termination of a public employee's employment is a result of that employee's political affiliation, the employee's lack of political affiliation or the political activities or affiliations of the individual allegedly hired to replace him. Rather, it is merely necessary to show that the newly hired individual either knew the public employer or had worked in some capacity in a public agency.

Furthermore, in failing to follow the Supreme Court's holdings in Elrod, Branti and Rutan and the Third Circuit's own decision in Laskaris, the courts below also created an as yet unrecognized distinction between the First Amendment rights of a person who chooses to engage in political activity and a person who does not so choose. Under the lower courts' interpretation, a plaintiff who alleges that his choice not to engage in political activity has negatively affected his employment does not have the burden of establishing that defendants knew of that plaintiff's decision not to participate, as required in Elrod and Laskaris, while an individual who has engaged in political activity must meet such a burden.

Moreover, the trial court also lowered the plaintiff's burden of establishing that a plaintiff's decision to participate or not in politics was a substantial or motivating factor in his employer's decision to terminate plaintiffs. In its opinion denying defendants' motion for judgment as a matter of law, the trial court indicated that, in cases involving the decision not to act, direct evidence is rare and such "knowledge must be inferred." In making this

statement, the trial court not only failed to point to one fact from which such inference could be made but also ignored the Third Circuit's decision in Laskaris holding that such knowledge cannot be inferred.

In light of the foregoing, it is clear that the holdings of the Court of Appeals and the district court below reflect a significant extension of established First Amendment jurisprudence. Neither this Court nor any Circuit Court of Appeals have ever premised a First Amendment violation in the absence of proof that a public employee's political affiliations or activties were the cause of his termination.. In fact, the decisions of this Court and other courts make plain that public employers would not considered liable for violating First Amendment rights without such proof. Simply stated, it could not have been clear to the defendants that the termination of plaintiffs' employment would in any way have violated their First Amendment rights.

Accordingly, while the decisions of the Third Circuit Court of Appeals and of the District Court are patently erroneous and should be reversed, they would also, if permitted to stand, constitute a significant extension of the principles previously enunciated by this Court in Elrod, Branti and Rutan and in the decisions of the various Circuit Courts of Appeal noted above. In turn, they would represent a a significant change and extension of the law in this area and one which a reasonable individual could not have anticipated. As a consequence, under the reasonably objective standard, defendants could not have known they were violating plaintiffs' rights and are entitled to qualified immunity under Harlow v. Fitzgerald.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Dated: June 26, 1995

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5401

JOSEPH CASALE;
WILLIAM EDMUNDS

v.

HAROLD W. GEORGE;
BARRY SKOKOWSKI, SR.,
MELVIN R. PRIMAS, JR.,
JAMES J. FLORIO
individually and in their official capacities.

Harold W. George, Barry Skokowski, Sr.,
and Melvin R. Primas, Jr.,
Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 91-cv-00324)
District Judge: Honorable Harold A. Ackerman

Submitted Under Third Circuit LAR 34.1(a)
March 27, 1995
Before: MANSMANN, COWEN and LEWIS, Circuit Judges.
Filed March 29, 1995

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court opinion dated November 4, 1993, by the Honorable Harold A. Ackerman at Civil Action No. 91-324; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

[Carol Los Mansman]
Circuit Judge

Attest:

[P. Douglas Sisk]
P. Douglas Sisk, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH CASALE and WILLIAM EDMUNDS,

Plaintiffs,

v.

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, JR.,

Defendants.

Civil Action No. 91-324

OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the court on the motion of the defendants Harold W. George, Barry Skokowski, Sr. and Melvin R. Primas, Jr., for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. Defendants made this motion at the close of plaintiffs' case, at which time I reserved a decision. I will now address the motion.

> Rule 50 provides in pertinent part:
> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally

> sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Fed. R. Civ. P. 50(a).

Judgment as a matter of law is therefore warranted "where there is insufficient evidence from which a jury could reasonably find for the opponent, the court viewing the evidence in the light most favorable to the opponent and giving him the advantage of every fair and reasonable inference." Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 85 (3d Cir. 1992) (citing Laskaris v. Thornburgh, 733 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984)). Keeping this standard in mind, I will now address defendants' motion.

Defendants argue that plaintiffs' claims simply do not implicate the First Amendment. Specifically, they argue that there is no evidence, nor even any allegation, that defendants had knowledge of plaintiffs' political affiliation. Accordingly, they argue that plaintiffs have not made out a sufficient First Amendment claim. I disagree. Plaintiffs are not claiming that they were dismissed because they were of the wrong political affiliation. Indeed, plaintiffs might even concede that the defendants did not know that the plaintiffs wee registered Republicans. In this case, plaintiffs are claiming that they were dismissed because they were not sufficiently involved with political parties or the political process.

This type of claim is clearly encompassed by the First Amendment, as interpreted by the United States Supreme Court in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). It is beyond dispute that "[f]reedom of association ... plainly presupposes a freedom not to associate." Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (emphasis added); see generally Abood v. Detroit Board of Education, 431 U.S. 209, 235 (1977); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Accordingly, the First Amendment prohibits the state from compelling a public employee to associate with a political party as a condition of retaining employment. See Elrod, supra; Branti; supra; accord Rutan v. Republican Party of Illinois, 497 U.S. 62, 64 (1990) ("First Amendment forbids government officials to discharge ... public employees solely for not being supporters of the political party in power").

In Elrod, for example, the Supreme Court held that the sheriff could not constitutionally replace certain employees with members of his own party because "the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." Elrod, 427 U.S. at 351, 173.

The Supreme Court reaffirmed these principles more recently in Rutan. In that case, the plaintiffs variously claimed that they had been denied promotions on the ground that they did not work for or did not support the Republican Party, or because they did not have the support of local Republican Party officials, or because they lacked Republican credentials. Under such facts, the Supreme Court affirmed the principle that "conditioning continued public employment on an employee's having obtained support from a particular political party violates the first amendment because of 'the coercion of belief that necessarily flows from the knowledge that one must have a

sponsor in the dominant party in order to retain one's job'." Rutan, 497 U.S. at 71 (quoting Branti, 445 U.S. at 516).

Thus, a public employee cannot be compelled to support or affiliate with a political party or the political process as a condition of his or her employment.

In addition, the Third Circuit has held that it is a violation of the First Amendment to demote an employee simply to make room for politically connected individuals. See Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987). In Bennis, the plaintiffs argued that they were demoted in retaliation for their support of a particular mayoral candidate. They also argued, in the alternative, that they were demoted in order to make room for the supporters of the opposing mayoral candidate who won the election. The defendants, in turn, argued that "Elrod and Branti should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters." Id. at 731. The Third Circuit rejected this argument, explaining

> The problem with this assertion ... is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one.

Id. The Third Circuit concluded that "the district court properly charged that the defendants could be found liable if they demoted the plaintiffs to fill positions for [the mayor's] political supporters." Id. at 732. In other words, the Third Circuit found that it would be a violation of plaintiffs' First Amendment rights if the defendants took action against them simply because they did not engage in

politics and were dismissed in order to make room for political supporters.

Applying the principles enunciated in these Supreme Court and Third Circuit cases, I find that plaintiffs' claims in this case, that is, that they were dismissed because they were insufficiently active in politics, and in order to make room for politically-connected individuals, fall within the protection of the First Amendment. Put differently, plaintiffs did not have to allege that they were fired because they were Republicans, or because they belonged to the wrong political party. As such, defendants' knowledge or lack of knowledge of plaintiffs' particular "political affiliation" is not relevant to this case. It is sufficient if they were dismissed because of their lack of political affiliation or involvement in a political party or in order to make room for politically connected individuals. I therefore find that the plaintiffs have alleged a legally cognizable claim under the first Amendment.

Having said this, plaintiffs wee nevertheless required to show that their protected activity was a substantial or motivating factor in the defendants' decision to dismiss them. The Third Circuit has held that implicit in this requirement is that the plaintiffs produce evidence sufficient to show that defendant had knowledge that plaintiffs wee engaged in the protected activity. Laskaris, 733 F.2d at 265; Perez v. Cucci, 723 F. Supp. 209, 239 (D.N.J. 1989). aff'd, 898 F.2d 139 (3d Cir. 1990). In this case, this means that the defendants must have had knowledge either that the plaintiffs exercised their rights not to be involved in the political process or political parties, or that the defendants were being dismissed in order to room for individuals with political connections. In such cases, of course, there will rarely be direct evidence of the requisite knowledge on the part of the defendants. Rather, such knowledge must ordinarily be inferred from all the facts and circumstances. In this case, viewing all the evidence

introduced by both parties in the light most favorable to the plaintiffs and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury could reasonably find for the plaintiffs on their First Amendment claims.

Defendants also argue that if plaintiffs' claim are found to implicate the First Amendment, they are entitled to qualified immunity.

"Government officials are entitled to a qualified immunity from liability for damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonably person should have known." Bennis, 823 F.2d at 732 (citing Mitchel v. Forsyth, 472 U.S. 511, 517 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1980)). Defendants apparently argue that the court's holding that plaintiffs' claims implicate the First amendment constitutes an "extension" of Elrod, and Branti and that the law, therefore, was not clearly established at the time of the dismissals.

The Third Circuit has "adopted a broad view of what constitutes an established right of which a reasonable person would have known." Burns v. County of Cambria, 971 F.2d 1015, 1024 (3d Cir. 1992) (citation omitted), cert. denied Roberts v. Mutsko, 113 S.Ct. 1049 (1993). In this regard, the court has held that "there does not have to be a 'precise factual correspondence' between the case at issue and a previous case in order for a right to be clearly established," and that a court "would not be 'faithful to the purpose of immunity by permitting ... officials one liability-free violation of a constitutional or statutory authority.'" Id. (quoting People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144-45 (3d Cir. 1984)).

Certainly, at the time of the dismissals, the right not to associate was clearly established, se, e.g., Jaycees, 468 U.S. at 623, as was the right not to be discharged from public employment based on lack of political affiliation with a political party. See Elrod, supra; Branti; supra. Moreover, the Third Circuit decided Bennis in 1987. Although Bennis is not factually identical to this case, one of the plaintiff's arguments in that case was that the reason for the dismissal was simply to make room for politically-affiliated persons. I, therefore, find that as of 1987, the law was clearly established that a government official may not dismiss an employee on the ground that the employee lacks political affiliation or in order to make room for politically- connected employees.

For these reasons, I am denying defendants' motion for judgment as a matter of law.[2]

---

[2]After the jury in this matter was discharged, the following matter was brought to the court' attention. In addition to awarding compensatory damages to the plaintiffs, the jury awarded nominal damages of $1.00 against each defendant, despite being instructed that it was to consider the issue of nominal damage only in the event it did not award any compensatory damages. This apparent inconsistency is not fatal, however. It is clear from the interrogatories as a whole that the jury found that plaintiffs has sustained actual damages, and that by answering the nominal damages interrogatories, the jury simply thought that it was permissible to award both nominal and compensatory damages. The court will therefore disregard the responses granting each of the plaintiffs nominal damages (Interrogatories Nos. 9 and 19). See McIntosh v. Weinberger, 810 F.2d 1411, 1436 (8th Cir. 1987) (where jury awarded both actual and nominal damages, and it was clear that jury found plaintiffs had suffered actual damages, it would be improper to disturb actual damages portion of award), cert. denied, 487 U.S. 1217 (1988) and cert. granted and judgment vacated on other grounds, 487 U.S. 12112 (1988); see also Floyd v. Laws, 929 F.2d 1390, 1397 (9th Cir. 1991) ("special findings issued in violation of the trial court's express instructions do not constitute legitimate or viable findings of fact. The trial court must therefore dismiss them as surplusage, as a matter of law."); White v. Grinfas, 809 F.2d 1157, 1161 (5th Cir. 1987) (where jury's answer to a question was supposed to terminate further inquiry, trial court may properly disregard "necessarily conflicting answers to any other questions" in violation of court's instructions).

IT IS therefore on this 4th day of November, 1993

ORDERED that defendants's motion for judgment as a matter of law is denied; and it is further

ORDERED that the judgment is this matter will not incorporate the answers to Interrogatories Nos. 9 and 10.

[Harold A. Ackerman]
Harold A. Ackerman, U.S.D.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH CASALE and WILLIAM EDMUNDS, Plaintiffs,	)	Civil Action No. 91-324
v.	)	
HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, JR., Defendants.	)	OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the court on the motion of the defendants Harold W. George, Barry Skokowski, Sr., and Melvin R. Primas, Jr., for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or in the alternative for a new trial pursuant to Fed. R. Civ. P.59.[3]

Judgment as a matter of law is warranted "where there is insufficient evidence from which a jury could reasonably find for the opponent, the court viewing the evidence in the light most favorable to the opponent and

---

[3]Defendants initially made a motion for judgment as a matter of law at the close of plaintiffs' case, and again at the conclusion of defendants' case. I reserved decision on the motion both times. On November 4, 1993, I issued an Opinion and Order denying defendants' motion. I incorporate that Opinion and Order in full herein.

giving him the advantage of every fair and reasonable inference." Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 85 (3d Cir. 1992) (citing Laskaris v. Thornburgh, 733 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984)).

A new trial may be granted "when, in the opinion of the trial court, the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to prevent a miscarriage of justice. Roebuck v. Drexel University, 852 F.2d 715, 736 (3d Cir. 1988); Shanno v. MaGee Indus. Enterprises, Inc., 856 F.2d 562, 567 (3d Cir. 1988). In evaluating the evidence, the district court may not substitute its view of the acts and the credibility of the witnesses for that of the jury. Shanno, 856 F.2d at 567. A decision to grant or deny a new trial is within the discretion of the trial court. See id. at 567 (quoting Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)).

Viewing all the evidence introduced by all parties at trial in the light most favorably to plaintiffs, and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury could reasonably find for the plaintiffs on their claims. In addition, viewing all the evidence introduced by the parties, I find that the verdict is not contrary to the great weight of the evidence.[4]

IT IS therefore on this 6th day of June, 1994

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[4]Defendants also raise two specific objections to the jury charge in this case, both of which are without merit. With respect to the first objection, I find that the requirement of defendants' knowledge was sufficiently covered by may instruction on "substantial or motivating factor." With regard to the second objection, I do not believe my use of the term "political connections" was misleading or confusing when viewed in the context of the entire case and the jury charge as a whole.

ORDERED that defendants' motion for judgment as a matter of law, or in the alternative, for a new trial, is denied.

[Harold A. Ackerman]
Harold A. Ackerman, U.S.D.J.

(2)

No. 94-2127

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, individually and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. When the District Court's holding that the Respondents were terminated from their positions of public employment based upon the Respondents' lack of political affiliation and in order to make room for politically-connected employees is entirely consistent with this Court's holdings in *Elrod v. Burns*, *Branti v. Finkel* and *Rutan v. Republican Party of Illinois*, should this Court grant Petitioners' Writ of Certiorari?

2. Should this Court grant a Writ of Certiorari to review a determination that Petitioners were not entitled to qualified immunity pursuant to *Harlow v. Fitzgerald* when the constitutional violation for which the Petitioners were held responsible, the termination of the Respondents' public employment based upon their lack of political affiliation and to make room for politically-connected individuals, was in fact well established in *Elrod* and *Branti* for well over a decade?

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No. 94-2127

In The

Supreme Court of the United States

October Term, 1995

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, individually and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

RESPONDENTS JOSEPH CASALE AND WILLIAM EDMUNDS RESPECTFULLY SUBMIT THAT PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BE DENIED

COUNTER-STATEMENT OF OPINIONS BELOW

The Petitioners' statement of the opinions below is correct insofar as it is presented. However, the Respondents would also like to call to the Court's attention the fact that in the jury questionnaire, the jury was specifically asked with

regard to each individual Petitioner's actions towards each individual Respondent:

> Did [Respondent] prove by a preponderance of the evidence that politics . . . was a substantial or motivating factor in the decision of [Petitioner] to remove him from his employment?

In answer to each question, the jury responded:

> Yes.

The jury was also asked with regard to each Petitioner and Respondent:

> Did the [Petitioner] prove by a preponderance of the evidence that he would have removed [Respondent] from his employment in the absence of political considerations?

In each case, the jury's answer was:

> No.

This makes it crystal clear that the finder of fact, the jury, found that each of the individual Petitioners was involved in the termination of the employment of each individual Respondent for political reasons: in this case, lack of involvement in the political process.

JURISDICTION

Petitioners' jurisdictional statement is complete and correct.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioners' statement of constitutional provisions and statutes is complete and correct.

COUNTER-STATEMENT OF THE CASE

This matter, from its inception as a complaint filed in the United States District Court for the District of New Jersey, has involved no novel questions, or unique and unusual interpretations, of the law. Rather, Respondents have at all times asserted a well established principal of constitutional law: that as non-policy-making employees of the State of New Jersey, it was a violation of their First Amendment rights to be removed from their positions of employment based upon their lack of political affiliation and/or lack of involvement in the political process, in order to make room on the payroll for politically connected individuals.

The Respondents, Joseph Casale and William Edmunds, were employed, respectively, as Supervisor of Investigations and Assistant Supervisor of Investigations in the Office of Ombudsman for the Institutionalized Elderly. Pursuant to New Jersey Statute, the Ombudsman's Office was "in but not of" the New Jersey Department of Community Affairs. This meant that while the Department of Community Affairs had certain responsibilities with regard to the Ombudsman's Office, including finances and certain paperwork associated with the fiscal and employment policies of the Ombudsman's Office, only the Ombudsman pursuant to New Jersey

Statute had the authority to hire or fire employees of the Ombudsman's Office.

Through September 1, 1990, the Respondent worked for Ombudsman William R. Abrams. As of September 1, Abrams was replaced as Ombudsman by Petitioner Harold W. George.

This matter involves questions of interpretation of facts which were presented at the trial in this matter. The Petitioners' presentation of facts represents neither an overview of all facts presented at the trial, nor, as should be set forth in Petitioners' Writ, a view of the facts which could reasonably have been reached by the jury favorable to the Respondents.

Thus, Petitioners allege that Respondents were only two of numerous personnel that Petitioners Barry Skokowski, Assistant Commissioner of the Department of Community Affairs, and Melvin Primas, Commissioner of the Department, discussed terminating in their meetings with William Abrams, then Ombudsman and allege that Abrams refused to participate in statewide and department wide budgetary savings through reductions of middle managers. Testimony at trial showed that Abrams was not directed to reduce the staff, he was specifically directed to remove the Respondents from their positions. Not only did Abrams testify that both Primas and Skokowski specifically directed him to terminate Casale and Edmunds, Respondent Skokowski specifically confirmed that he had selected Casale and Edmunds for termination. Skokowski further confirmed that Abrams told Skokowski that if there were layoffs, he wanted to be

the one who made the decision as to whom to lay off, and that Skokowski denied Abrams that discretion.

The Petitioners' allegation that Abrams was terminated as the Ombudsman based on his refusal to terminate employees and to otherwise cooperate with the Administration's efforts to reduce the level of expenditures in State government is untrue; in fact, Abrams was specifically told by Petitioner Skokowski that he would be fired if he refused to fire the Respondents.

That the Respondents Casale and Edmunds were specifically targeted for termination was confirmed by Abrams in a letter to Petitioner Primas dated July 26, 1990 requesting:

> . . . that the Administration reconsider its decision to terminate Joseph Casale, Supervisor of Investigations and William Edmunds, Assistant Supervisor of Investigations, after I leave office.

The sole response received by Abrams was a letter thanking Abrams for his service as Ombudsman. Primas at no time responded stating that Abrams had never been directed to terminate the services of the Respondents Casale and Edmunds.

The Petitioners further err in stating there was no evidence that the new hires in the Ombudsman's Office, Elaine Mahoney, Tom Brown and William Macchi, were hired for reasons of political participation or affiliation. It is true that, as is frequently the case in any discrimination situation, the motivations of the Petitioners were never absolutely and positively articulated. Rather, the jury was able to draw the conclusion that such hirings had political motivations based upon a review of known facts

concerning Mahoney, Brown and Macchi, together with a review of the testimony of the Petitioners with regard to the purported reasons which they set forth for the hiring of Brown, Mahoney and Macchi, as well as the purported reasons for the termination of Respondents. Among the facts presented from which the jury could reasonably have concluded that the reasons for the hiring of Macchi, Mahoney and Brown were based upon their political participation and/or affiliation, and that the reason for the termination of the Respondents was specifically to make room for these individuals are the following:

1. Petitioner Primas' political affiliations are clear. Primas had a long time affiliation with the Democratic party: he served as a member of the City Council of Camden for eight years, was Mayor of Camden for eight and a half years and he was appointed by Democratic Governor Jim Florio, whom he had known since 1973, to be one of nineteen or twenty members of the Governor's cabinet, the Commissioner of the Department of Community Affairs. Primas had known Tom Brown for over fifteen years and was instrumental in hiring Brown. However, he did not know what job Brown was hired to do.

2. Mahoney's participation in the political process is undisputed. She had worked in the Governor's Office in Washington, D.C. and on legislation and lobbying before the New Jersey Legislature.

3. Macchi had been Director of Aging in Hudson County at the time he was hired in the Ombudsmans Office. Although Petitioner Skokowski claimed he was unaware of Macchi having any political connections, he subsequently testified "that major jobs in Hudson County

traditionally until recently have been from political connections" and that at the time of the trial, Macchi was working for the Whitman campaign.

4. Although Petitioners Primas and Skokowski offered a number of reasons for the hiring of Macchi, Mahoney and Brown, the jury clearly chose not to believe this testimony, given that:

(a). The job duties for which Mahoney, Macchi and Brown were hired were so unclear that Abrams, the Ombudsman, at the time Mahoney, Macchi and Brown were hired, was given no information as to their job duties and salaries from the individuals who hired them, Petitioners Primas and Skokowski, other than their starting dates. Primas, who made the determination to hire Brown, made no decision as to what his job title or job duties would be. In fact, when Harold George, the new Ombudsman, came to work, he was unable to ascertain Macchi or Mahoney's job titles or job duties, nor was he able to ascertain Brown's job title.

(b). Although Petitioners Skokowski and Primas claimed that Brown, Mahoney and Macchi were hired to perform essential functions in the Ombudsman's Office, neither of the two ever notified the incumbent Ombudsman Abrams as to the alleged deficiencies that needed to be corrected.

(c). Statutorily, only the Ombudsman has the power to hire and fire employees in the Ombudsman's Office. Brown, Mahoney and Macchi were the only three employees who appeared on the payroll during Abrams' term as Ombudsman with no input from Abrams and they were the only three employees in the Ombudsman's

Office who were ever directly hired by Primas or Skokowski.

(d). At the time Macchi, Mahoney and Brown were hired, there was a hiring freeze throughout State government which had gone into effect in 1989 during the Kean administration and continued until after the terminations of the Respondents, as well as an attempt to eliminate middle management positions. Nonetheless, during the hiring freeze, Macchi, Mahoney and Brown were hired into middle management positions.

(e). Although Petitioners Primas and Skokowski claimed that it was incredibly painful to have to layoff long time middle managers from the Department of Community Affairs due to the budgetary crisis, they looked only to Mahoney, Macchi and Brown, three employees whose resumes came from the Governor's Office, to fulfill the alleged need in the Ombudsman's Office and did not look to individuals being laid off from Community Affairs to see if any of those individuals had the necessary qualifications to fulfill the alleged needs in the Ombudsman's Office.

5. Although Petitioner George, who did the actual termination of Respondents, claimed the termination was based on an independent assessment of the needs of the Ombudsman's Office and without any knowledge that Petitioners Primas and Skokowski had previously directed the termination of these two individuals, the jury could easily have concluded that this was false in light of the facts that:

(a) Due to the fact that Respondent Casale was out sick at the time that petitioner George came to work

as the Ombudsman, he had never met with Casale nor spoken to him on the telephone at the time that he reached the decision to terminate him.

(b) Although Petitioner George had spoken to Respondent Edmunds at the time he made the decision to terminate him, he could not refute testimony that the discussion consisted solely of saying hello or otherwise greeting each other.

(c) Although Petitioner George when he worked as a Deputy Attorney General had been impressed by the quality of work done in the Ombudsman's Office, he made no effort to find out if anyone remaining at the Office was responsible for that work.

(d) Petitioner George never reviewed Respondents Edmunds' or Casale's personnel files prior to making the decision to terminate their employment.

(e) Petitioner George made no attempt to discover if the Respondents had any information or contracts which could be helpful to the Office.

(f) Petitioner George relied, according to himself, only on the recent political hirees, Mahoney and Brown, for his information as to how the Office functioned based upon which he determined to terminate the employment of Casale and Edmunds.

Respondents have never argued that this is a case in which the facts are not subject to interpretation. Petitioners' entire legal argument in this matter is based on the Petitioners' interpretation of the facts and an

unwillingness to live with the fact that the jury found the facts favorable to the Respondents.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

Petitioners in this matter argue that certiorari should be granted by this Court because the Court below allegedly created, extended or changed the existing law concerning the impact of the First Amendment on termination from public employment for reasons of political affiliation or the lack thereof. The Petitioners reached this conclusion by setting forth a version of the facts which was advanced by Petitioners in front of the jury, before the District Court Judge in their request for a new trial and before the Third Circuit in their appeal of the determination of the District Court. However, the facts as found by the jury, and the District Court, and as upheld by the Third Circuit, require no extension of, change of or even reinterpretation of existing case law as it interprets the application of the First Amendment to the rights of non-policymaking public employees.

This court has made it clear for many years in its decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) that the First Amendment to the United States Constitution guarantees non-policy making public employees the right to participate in or not participate in the political process, and further that the right to participate in or not participate in the political process extends beyond the rights of employees to participate in

or with political parties, or to refrain from such activity. There is thus no special or important reason for the Court to grant certiorari in this matter, solely to revisit issues which it has reiterated time and time again.

As the principles applied by the District Court and the Court of Appeals were the principles enunciated by this Court in *Elrod, Branti* and *Rutan*, there was no extension of clearly established statutory or constitutional rights which would, pursuant to this Court's determination in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), grant to the Petitioners qualified immunity.

For this Court to find novel or unusual legal issues to address, it would first have to revisit and reinterpret the facts contrary to the factual findings made by the jury and the District Court. It is therefore requested that this Court deny the Petitioners' application for a Writ.

A. PETITIONERS FAIL TO PRESENT A SPECIAL OR IMPORTANT ISSUE BECAUSE THE COURTS BELOW DID NOT EXTEND OF CHANGE THIS COURT'S HOLDINGS IN *ELROD, BRANTI* AND *RUTAN*

The guarantee of the First Amendment to the United States Constitution that public employees (with the exception of certain policy-making employees not relevant herein) have the right to participate in or not participate in the political process extends beyond the rights of employees to participate in or with political parties, or to refrain from such activity. This right extends to taking part in or not taking part in the political process altogether, as determined by this Court in *Elrod v. Burns*, 427

U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

This Court stated in *Elrod, supra*

> Non-policy making individuals usually have only limited responsibility and are therefore not in a position to support the goals of the in party . . . It is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests . . . *Elrod* at 367-368.

In *Elrod*, employees of the Sheriff's Office of Cook County, Illinois alleged that they were being threatened with discharge solely because they were not affiliated with or sponsored by the Democratic Party. This Court agreed, holding that the practice of patronage violates the First and Fourteenth Amendments because it severely restricts political beliefs and association. *Elrod* at 355.

In *Branti*, this Court held that continued employment of assistant public defenders could not be contingent upon allegiance to a particular political party. In *Rutan, supra*, this Court again ruled that it was an infringement of First Amendment rights to base hiring and promotion decisions on political affiliation and support.

The Third Circuit in *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), held that the right not to participate and/or not to associate includes the right not to be removed from employment solely for the purpose of making room on the payroll for those who have exercised the right to participate and/or associate. In *Bennis*, the Court stated:

> The problem with this assertion . . . is that an alternative view of the demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one. *Bennis* at 731.

In his decision of November 4, 1993, the Honorable Harold A. Ackerman found that appellees' claim in this case "that they were dismissed because they were insufficiently active in politics, and in order to make room for politically connected individuals fall within the protection of the First Amendment." (7a).

Contrary to Petitioners' assertions that there was no proof that lack of political involvement caused Respondents' terminations, Judge Ackerman found that as Respondents had sufficiently proven that their dismissals stemmed from the desire to make room for politically connected individuals, the verdict would survive a judgment notwithstanding the verdict. He found the jury properly concluded that the appellees were removed based upon their lack of participation in the political process. The testimony of the two appellees, their chief witness, and the contradictions and inconsistencies in the testimony of the appellants supported that point.

The various cases in the Circuits that Petitioners contend support their claim that the within matter represented an extension or change in existing law in fact support the findings of the jury and the Court. *Laskaris v. Thornburg*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied* 469 U.S. 886 (1984), *Savage v. Gorski*, 850 F.2d 64 (2nd Cir. 1988), *Correa v. Fischer*, 982 F.2d 931 (5th Cir. 1993),

Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980), *McMillian v. Svetanoff*, 878 F.2d 186 (7th Cir. 1987) and *Erickson v. Pierce County*, 950 F.2d 801 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 815 (1992) all stand for the position undisputed by the Respondents, the District Court and the Third Circuit in this matter that the Respondents had the burden of proving that their termination was the result of their involvement or lack of involvement in the political process. The Respondents satisfied that burden in the eyes of the jury, the District Court Judge and the Third Circuit (and have only failed to satisfy that burden in the eyes of Petitioners, when viewing the facts solely from the point of view of Petitioners).

Under the aforementioned case law, Respondents were required to show that their activities or non-activities were substantial or motivating factors in the Appellants' decision to dismiss them. This requirement was satisfied. Judge Ackerman stated that in order to meet this requirement:

> Defendants must have had knowledge either that the plaintiffs exercised their rights not to be involved in the political process or political parties, or that defendants were being dismissed in order to make room for individuals with political connections. In such cases, of course, there will rarely be direct evidence of the requisite knowledge on the part of the defendants. Rather, such knowledge must ordinarily be inferred from all the facts and circumstances. In this case, viewing all the evidence introduced by both parties in the light most favorable to the plaintiffs and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury

> could reasonably find for the plaintiffs on their First Amendment claims. (7a-8a).

The evidence presented to the jury overwhelmingly supported Respondents' position.

It was well within the role of the jury to disregard the credibility of the Petitioners and credit the testimony of the Respondents and their chief witness, William Abrams. The jury, given the totality of facts presented, and given the right of the jury to make credibility determination and draw inferences from the fact, drew the conclusions which led to the verdict as set forth by the jury in the interrogatories, a verdict completely consistent with the law as stated in *Elrod, Branti* and *Rutan.*

B. AS THIS MATTER DID NOT INVOLVE A CHANGE IN OR EXTENSION OF THE PRINCIPLES ENUNCIATED IN *ELROD, BRANTI* AND *RUTAN,* THE PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court set forth the standard to be imposed in determining whether or not government officials are entitled to qualified immunity. In *Harlow,* the Supreme Court held:

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . .
>
> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred . . . if the

> law was clearly established, immunity defense ordinarily should fail, since a reasonable confident public official should know the law governing his conduct. *Harlow* at 818-819.

Elrod was decided in 1980; *Branti* was decided in 1980; and *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), which clarified that the First Amendment rights enunciated in *Elrod* and *Branti* included the right not to be removed to make room for political supporters, was decided in 1987. All of those cases established the right of a person to not be discharged from public employment based on lack of political affiliation with a political party. As Judge Ackerman stated:

> Although *Bennis* is not factually identical to this case, one of the Plaintiff's arguments in that case was that the reason for the dismissal was simply to make room for politically affiliated persons. I, therefore, find that as of 1987, the law was clearly established that a government official may not dismiss an employee on the ground that the employee lacks political affiliation or in order to make room for politically-connected employees (9a).

Respondents have fully set forth in Section A of their Argument the reasons why this matter involves no change in or extension of existing law. Petitioners not only could have known but should have known that they were violating Respondents' First Amendment rights. They are not entitled to qualified immunity under *Harlow*. Petitioners' claims to the contrary should be dismissed.

CONCLUSION

Petitioners have set forth no special or important reason for their Writ of Certiorari to be granted. That Writ should be denied, as the facts as found by the jury and the District Court required only the application of existing law, without extensions, modification or change.

The Petitioners are only able to set forth reasons for this Court to consider their Writ for Certiorari based on alleging facts not as found by the jury and the District Court, but as the Petitioners wish the facts to have been found. Dissatisfaction with factual findings at the District Court level does not present a special or important reason for this Court to grant Certiorari and it is respectfully requested that the Petitioners' request for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-2127

In the

Supreme Court of the United States

October Term, 1994

HOWARD W. GEORGE, BARRY SKOKOWSKI, SR. and MELVIN R. PRIMAS, individually, and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUMMARY OF ARGUMENT. 1

ARGUMENT

IN THE ABSENCE OF ANY INDICATION WHATSOEVER IN THE RECORD THAT THE EMPLOYMENT DECISIONS MADE BY THE PETITIONERS WERE IN ANY WAY PREMISED UPON THE POLITICAL AFFILIATIONS AND ACTIVITIES OF EITHER THE RESPONDENTS OR THOSE INDIVIDUALS HIRED BY THE PETITIONERS TO WORK IN THE OMBUDSMAN'S OFFICE, IT IS CLEAR THAT THE PRINCIPLES SET FORTH IN ELROD V. BURNS, BRANTI V. FINKEL, AND RUTAN V. PEPUBLICAN PARTY OF ILLINOIS HAVE NO APPLICATION TO THE CIRCUMSTANCES PRESENTED IN THIS MATTER 2

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No. 94-2127

In the

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Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF ON BEHALF OF PETITIONERS

PRELIMINARY STATEMENT

Petitioners Harold W. George, Barry Skokowski, Sr., and Melvin R. Primas, Jr. submit this brief in reply to the brief filed by the respondents Joseph Casale and William Edmunds in this matter. In filing this reply brief, the petitioners will rely on the Statements of Questions Presented, Opinions Below and Jurisdiction, and the Statement of the Case set forth in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The First Amendment, and this Court's holdings in Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445 U.S. 347 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), protect public employees from discharge because of their affiliations with, or their activities on behalf of, political candidates and political parties. The record in this matter does not disclose any facts regarding the political affiliations and activities of either the respondents or the individuals hired by the petitioners to work in the Office of the Ombudsman for the Institutionalized Elderly. Moreover, the record does indicate that none of the petitioners were aware of what, if any, political affiliations or beliefs these individuals may have had. In light of these circumstances, it is clear that the principles enunciated by this Court in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois have no application to the facts presented in this matter, that the decisions rendered by the Circuit Court of Appeals and the District Court consequently constitute an unwarranted and unprecedented misapplication of such holdings, and that the petition for writ of certiorari which has been filed in this matter should accordingly be granted for the purpose of reviewing and reversing these decisions.

ARGUMENT

IN THE ABSENCE OF ANY INDICATION WHATSOEVER IN THE RECORD THAT THE EMPLOYMENT DECISIONS MADE BY THE PETITIONERS WERE IN ANY WAY PREMISED UPON THE POLITICAL AFFILIATIONS AND ACTIVITIES OF EITHER THE RESPONDENTS OR THOSE INDIVIDUALS HIRED BY THE PETITIONERS TO WORK IN THE OMBUDSMAN'S OFFICE, IT IS CLEAR THAT THE PRINCIPLES SET FORTH IN ELROD V. BURNS, BRANTI V. FINKEL, AND RUTAN V. REPUBLICAN PARTY OF ILLINOIS HAVE NO APPLICATION TO THE CIRCUMSTANCES PRESENTED IN THIS MATTER.

In their brief in opposition to the Petition for Writ of Certiorari in this matter, the respondents argue that the decisions rendered by the Court of Appeals and the district court below raise no novel, unique or unusual interpretations of law. However, as has been amply demonstrated in the Petition for Writ of Certiorari filed by the petitioners, the decisions of these lower courts would extend the protections afforded by the First Amendment, and the principles enunciated in this Court's opinions in Elrod, Branti and Rutan in this regard, far beyond their intended scope and accordingly demand review and reversal by this Court.

In seeking to avoid review of this case by this Court, respondents essentially argue that the record in this matter contains facts which would support a finding that the respondent's exercise of their First Amendment rights to affiliate or not affiliate with, or to engage or not engage in political activities on behalf of, a political candidate or political party was the basis for the termination of their employment with the Office of the Ombudsman of the Institutionalized Elderly. However, in making this assertion, respondents fail to note a single fact in their brief regarding either their political affiliations or activities or the political affiliations or activities of those individuals who were hired to work in the Ombudsman's Office during the time period in question.

Certain basic, salient facts are clear regarding the termination of the plaintiffs' employment with the State of New Jersey. Respondents were employed in the Office of the Ombudsman for the Institutionalized Elderly as "at will" employees and accordingly were subject to termination without cause. Prior to their termination, their supervisor was an individual named Rick Abrams. Abrams was asked by two of the defendants, Skokowski and Primas, to terminate the respondents' employment. Abrams indicated he would not do so. As consequence of this and other circumstances, it was determined that Abrams would be removed from his position as Ombudsman. However, it was also determined that he would continue to serve as Ombudsman, in a holdover capacity, until his replacement was appointed.

During the interim time period that Abrams was serving in a holdover capacity, Primas and Skokowski were responsible for ensuring the proper operation of the New Jersey Department of Community Affairs and its constituent agencies and divisions. In carrying out these responsibilities, they hired certain individuals to work in the Ombudsman's Office. Two of these individuals, Macchi

and Mahoney, had previously been employed in other governmental positions in the State of New Jersey. Macchi had served as executive director of a county office in aging and, in that position, was responsible for administering a variety of programs for the elderly. Mahoney had been employed previously in the New Jersey Governor's office in Washington, D.C. as well as with a private association that dealt with governmental issues. A third individual, Brown, had previously been employed in certain public and private institutions in the State of Maryland which dealt with the problems of the elderly and had also known the defendant Primas for a substantial period of time. While Abrams was not consulted with regard to the appointment of these individuals, it was clear that he was serving in a holdover capacity and would only continue to serve in that capacity for a short period of time.

Following his appointment to replace Abrams as Ombudsman, the defendant George reviewed the operations of the Office of the Ombudsman. He decided to retain the individuals previously hired by Primas and Skokowski, to also hire a legal counsel, and to terminate the employment of the respondents. He advised the respondents of this determination in writing. Subsequently, he met with them and advised them that they had been terminated for budgetary reasons.

In evaluating the contents of the record, it is essential to note not only what is contained, but also what is not contained, in the record. There is nothing in the record to indicate whether either of the respondents had ever been affiliated with, or had ever engaged in any political activity on behalf of, any political candidate or any political party. What the record does make clear is that none of the petitioners were aware of what, if any, political affiliations or beliefs the respondents may have had. The record also fails to indicate whether either Macchi, Mahoney or Brown had ever been affiliated with, or engaged in any political

activity on behalf of, any political candidate or political party. Moreover, the record contains no indication that any of the defendants were aware of or considered what, if any, the political affiliations or activities of these individuals may have been.

Consideration of what facts are and are not contained in the record clearly demonstrates that this case has absolutely nothing to do with the exercise of rights of political affiliation and political activity under the First Amendment. More specifically, there is nothing in the record to indicate that the decisions made by the petitioners to discharge certain individuals and hire others had anything to do with these individuals' support or failure to support any political party or candidate. In turn, in the absence of any indication in the record that any of the defendants considered, or were even aware of, the political affiliations and activities, or lack thereof, of the respondents, it is clear that any such affiliations or activities could not have been a factor in the decision to terminate the respondents' employment.

Similarly, in the absence of any indication in the record that the defendants considered, or were even aware of, the political affiliations and activities, if any, of any of the individuals who were hired to work at the Ombudsman's Office during the time period in question, there is also no basis whatsoever to conclude that such affiliations or activities had anything to do with the decisions to hire those individuals. Rather, this case simply involves the discharge of two "at will" public employees who were subject to discharge for any or no reason at all. It does not involve, and has absolutely nothing to do with, any deprivation or chilling of the respondents' right of political affiliation under the First Amendment.

Respondents attempt to circumvent these basic facts by asserting repeatedly in their brief that the individuals hired to work in the Ombudsman's Office during the time period

in question were involved in "the political process" and were "politically connected". A review of respondents' brief indicates that, in employing the terms "political process" and "political connections", respondents are not referring to activities, such as affiliating with political parties or engaging in partisan political activities, which would fall within the protection of the First Amendment. Rather, the references in their brief to involvement in the "political process" and to "political connections" pertain to the prior public employment of Mahoney and Macchi and the prior personal relationship between Brown and Primas. Of course, hundreds of thousands of other individuals, including the plaintiffs, have been or are now employed in the public sector. Similarly, individuals with prior professional or personal relationships with public officials have been offered and secured public employment. Previous employment by public entities and prior professional or personal relationships with public officials do not implicate the exercise of First Amendment rights. Such activities are clearly distinct from and have nothing to do with the type of affiliations with or activities on behalf of political candidates and organizations which are protected by the First Amendment.

What the respondents are really saying in arguing that they were terminated in order to permit the appointment of other individuals who were "politically connected" is evidenced by the statement made by respondents' counsel during her closing statement in which she stated that this is a case of "it's not what you know, it's who you know" (Pa 424).[1] While, such an assertion was clearly intended to characterize the actions of the petitioners in a negative and pejorative manner, such a characterization has nothing to do with the exercise of the First Amendment rights. Rather, to invoke the protections afforded under the First Amendment,

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[1]The reference "Pa" refers to the Appendix filed by the petitioners with the Third Circuit Court of Appeals below.

some clear demonstration is required that the termination of the respondents' employment was a result of their political affiliations or activities. Respondents have simply failed to make any such demonstration.

Accordingly, there is nothing in the record to indicate that the termination of the respondents' employment with the Office of the Ombudsman had anything to do with any decisions which they have made to either affiliate, or not affiliate, with any political candidate or political party. There is nothing in the record to indicate that the termination of the respondents' employment had anything to do with their decision to engage, or not engage, in political activity protected by the First Amendment. There is nothing in the record to indicate that any of the three individuals who were hired to work in the Office of the Ombudsman during the time period in question had been affiliated with any political candidate or any political party. Nor is there anything in the record to indicate that any of these individuals had ever engaged in any political activity on behalf of any political candidate or political party. In sum, there is nothing in the record to indicate that the decisions to terminate the employment of the plaintiffs and the decisions to hire the other three individuals were, in any way, related to the affiliations, or lack thereof, of such individuals with any political candidate or any political party or with the activities undertaken by such individuals on behalf of such candidates or such political parties.

In sum, it is clear that the decisions rendered by the courts below constitute a totally unwarranted extension of the principles set forth in Elrod, Branti and Rutan and would serve to entitle any public employee who lost his or her job to recover damages against his or her former public employer in any case in which that employee could show that his or her former employer had elected to hire other individuals who had previously held positions of public employment or who had previously had some professional

or personal relationship with a public official. This Court's holdings in Elrod, Branti and Rutan simply do not stand for the propositions which have been asserted by respondents and which are implicit in the decisions of the lower courts in this matter. Accordingly, this court should grant the petition for certiorari.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari previously filed with this court, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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